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No. 09-1373

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GREGORY THOMPSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the Tennessee Supreme Court unreasonably applied *Ford v. Wainwright*, 477 U.S. 399 (1986), when it disregarded evidence of Thompson's delusions and long history of severe mental illness as "irrelevant" and failed to conduct a hearing before ruling Thompson competent to be executed.

2. Whether the court of appeals correctly concluded that promulgation of Tennessee Supreme Court Rule 39, which demonstrated that the district court misinterpreted state law at the time it dismissed habeas claims as procedurally barred in a capital case, was an extraordinary circumstance warranting relief under Rule 60(b)(6).

3. Whether the certificate of appealability allowed the court of appeals to consider fully the question whether to grant relief under Rule 60(b)(6).

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 580 F.3d 423. The opinion of the court of appeals denying rehearing and rehearing en banc (Pet. App. 179a-80a) is unreported. The memorandum opinion and order of the district court regarding Thompson's *Ford* claim (Pet. App. 66a-155a and Pet. App. 156a-57a, respectively) are unreported. The memorandum order of the district court regarding Thompson's Rule 60(b) motion (Pet. App. 158a-73a) is unreported. The opinion of the Tennessee Supreme Court is reported at 134 S.W.3d 168.

JURISDICTION

The court of appeals entered judgment on September 11, 2009, and denied rehearing and rehearing en banc on January 12, 2010. On April 7, 2010, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including May 5, 2010. On May 7, 2010, Justice Stevens further extended the time to file the petition to and including May 10, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

The petition presents no question warranting this Court's review. The petition does not identify any conflict in the lower courts over any of the questions presented. And although the State asserts that the decision below conflicts with this Court's decisions, that assertion falls of its own weight, as the State acknowledges that the facts and law of the case differ from those involved in this Court's decisions.

The decision below is also highly fact-bound and has little effect beyond this case. The competency-to-be-executed claim at issue in the first question presented was adjudicated in state court before this Court's decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), which will be the relevant standard for future cases. The decision of the court of appeals to afford relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure at issue in the second question presented involves the application of a single state's procedural rule under the unique circumstances of this case, where the adoption of that rule confirmed that the district court's prior decision dismissing ha-

beas claims as procedurally barred was erroneous at the time it was issued. And the third question presented involves the scope of the certificate of appealability (COA) and the particular factual circumstances under which it was issued below. None of these narrow and fact-bound questions warrants review.

The decision below also remands the case for further proceedings, rendering the petition interlocutory and premature. Those proceedings in the district court may very well either alter the nature of the questions presented or render the State's arguments moot altogether. For example, if the district court affords relief on Thompson's previously (and wrongly) barred ineffective-assistance claims, the competency-to-be-executed claim will become moot. There is thus no warrant for this Court's review at this time.

Even if error-correction of a fact-bound decision of limited significance that does not implicate any conflict in the lower courts could warrant review, the court of appeals faithfully applied this Court's decisions and reached the correct result on the facts presented, and so there is no error to correct. This Court squarely rejected the State's contention that *Ford v. Wainwright*, 477 U.S. 399 (1986), does not constitute "clearly established law" under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, in *Panetti*. And the Tennessee Supreme Court violated the clearly established law in *Ford* in precisely the same way as the lower court in *Panetti*. Specifically, it relied on Thompson's mere awareness of the execution and the State's reason for

it when *Ford* requires an examination into his rational understanding. The Tennessee Supreme Court also excluded evidence of Thompson's delusions and history of mental illness, which *Ford* clearly makes relevant to the inquiry, and it failed to hold the hearing required by *Ford* after Thompson made a substantial threshold showing of incompetency.

The decision below also correctly afforded Thompson the opportunity to pursue certain ineffective-assistance claims in federal court for the first time. In adopting its Rule 39, the Tennessee Supreme Court confirmed that the district court erred *at the time it issued its decision* in dismissing those claims as procedurally barred. Although development of the law over time is common and does not typically constitute an "extraordinary" circumstance sufficient to reopen a judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure, a state supreme court's confirmation of the fact that a federal court, at the time it issued its decision, misapplied state law in barring constitutional claims in a capital case is both rare and extraordinary. Thompson also acted diligently in pursuing those claims, and could not have sought Rule 60(b)(6) relief earlier, as the State suggests, because then-controlling circuit court precedent would have deemed a motion to reopen a judgment to be a successive habeas petition.

Finally, the State's claim that the court of appeals exceeded the scope of the COA misses the mark. The court of appeals granted a COA on the question "whether the Tennessee Supreme Court's enactment of Tenn. S. Ct. R. 39 is an extraordinary

circumstance *sufficient to warrant* re-opening Thompson's original § 2254 petition," Pet. App. 65a (emphasis added), a question that, as this Court already held in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), logically encompasses the question whether the habeas petitioner acted diligently in seeking relief. The State's cramped and contrary reading would render the court of appeals' decision to grant the COA an academic exercise and its later decision an advisory opinion.

For these reasons, certiorari should be denied.

STATEMENT

Thompson suffers from schizophrenia, and he is both delusional and psychotic. He was charged with first-degree murder in 1985 in Coffee County, Tennessee. Thompson's counsel failed to adequately investigate the issue of his mental illness. At trial, his counsel conceded guilt, called no witnesses, and presented no proof. The jury found Thompson guilty of first-degree murder, a capital crime. The jury imposed the death penalty, and the trial court sentenced Thompson to death.

A. Thompson's Competency To Be Executed

1. On January 21, 2004, the State moved to set Thompson's execution date. Thompson opposed the motion on the ground that he was incompetent to be executed. The Tennessee Supreme Court set an execution date, but remanded the case to the trial court to evaluate Thompson's competency claim.

2. In *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court held that "the Eighth Amendment prohibits a State from carrying out a sentence of death

upon a prisoner who is insane." *Id.* at 409-10. The Tennessee Supreme Court responded by adopting a substantive state-law standard for competency, as well as the procedures by which a prisoner sentenced to death can assert a claim of incompetency. *See Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999). Under that standard, a prisoner is not competent to be executed if he "lacks the mental capacity to *understand* the fact of the impeding execution and the reason for it." *Id.* at 266 (emphasis added). The state requires a prisoner asserting that he is incompetent to be executed to file a petition in the state trial court "clearly set[ting] forth the facts alleged to support the claim that execution should be stayed due to present mental incompetence," and attaching "affidavits, records or other evidence supporting the factual allegations of mental incompetence." *Id.* at 267. If the prisoner "make[s] a threshold showing that he . . . is presently incompetent," the court must hold a hearing at which the prisoner "shall be allowed to present all evidence material and relevant to the issue of competency." *Id.* at 269, 271.

3. On March 1, 2004, in accordance with *Van Tran*, Thompson filed a petition seeking a hearing on his competency to be executed. He provided eighteen exhibits documenting his severe mental illness throughout his years in custody and his present incompetency to be executed. The exhibits included (1) portions of Thompson's prison mental-health records; (2) affidavits from three mental-health professionals who had recently evaluated Thompson; and (3) documents revealing that the State had previously considered him incompetent and sought appointment of a conservator to oversee his affairs.

a. The medical records Thompson submitted showed that he had been diagnosed in prison as "schizophrenic, paranoid type" and as having "bipolar affective disorder." Pet. App. 4a. The records also documented Thompson's "mood swings," the fact that he hears voices, and that he has repeatedly engaged in acts of self-harm, including "swallowing poison, cutting his wrists and arms, and burning his hand and face." *Id.* These records also cataloged Thompson's severe and pervasive delusions, including his beliefs that he is God and in control of the world, J.A. 06-5744, at 1111-12, that he will get out of prison because "Big Bird is on his side," *id.* at 1120, or because he is a wealthy songwriter, *id.* at 1063, and that the woman he was convicted of murdering is an employee at the prison special-needs facility where he is housed, *id.* at 1124-25.

b. Thompson also submitted reports from three mental-health professionals who evaluated him in the months preceding the petition. The first report was from Dr. Rabun, a forensic psychiatrist. Dr. Rabun reviewed Thompson's medical records and trial transcripts, and interviewed him twice. Those interviews showed that Thompson has been hearing voices since at least the time of his conviction, and that the voices diminish when he takes his antipsychotic medication. Pet. App. 5a. Thompson related a number of his delusions to Dr. Rabun, including that he is a famous songwriter who has "written many of the songs heard on the radio"; that he has "buried a large stash of money, gold bars, and a 'Grammy Award' near" a church in Georgia; and that he is a lieutenant in the Navy and his conviction will be

overturned once his Navy records are discovered. *Id.* at 5a-6a; *see also* J.A. 06-5744, at 439-42.

When asked by Dr. Rabun, Thompson admitted that he had killed a woman, but explained at length that his work in the Navy would result in his conviction being overturned and that his "'one million dollars,' the 'Grammy Award,' and the 'gold bars,' buried near a church in Georgia" were "mitigators," which, if presented to the court, would make him a "free man." J.A. 06-5744, at 442-43, 447. And while Thompson indicated that he had been sentenced to death, Dr. Rabun explained that "he holds the delusional perception that he will not be executed" because of the "mitigation" evidence in his favor. *Id.* at 448. Thompson also told Dr. Rabun that execution by electrocution will not kill him. As Thompson explained to Dr. Rabun, "I am used to being shocked, every time I touch my TV, I get shocked, [and] when I went to a chiropractor in 1982, he twisted my neck, and it felt like a shock." *Id.*

Based on his interviews with Thompson and review of Thompson's medical records, Dr. Rabun diagnosed Thompson as suffering from "Schizophrenia, Undifferentiated Type, Continuous" and concluded that "Thomson lacks the mental capacity to *understand* the fact of the impending execution and the reason for it." J.A. 06-5744, at 444, 449 (emphasis added).

The second report came from Dr. Woods, a psychiatrist who interviewed Thompson for three hours and reviewed his medical records and trial testimony. J.A. 06-5744, at 462. Dr. Woods noted that "even after being found competent to control his own

psychiatric treatment, and being compliant with [his] treatment, Mr. Thompson remains so grossly psychotic that only the most superficial interrogation would not only reveal his profound psychosis, but his current incompetency." *Id.*

Dr. Woods' interview with Thompson revealed that Thompson "believes that he can not die, and there will be a two year period in which he will stay alive, even if he were executed," after which point "a decision will be made whether he will go to Hawaii or 'Gangster's Paradise.'" J.A. 06-5744, at 463, 466. Thompson also expressed some of the same delusions as he had to Dr. Rabun, including that he cannot die from electrocution and that he will be exonerated by a military tribunal because of his Navy records. *Id.* Based on the interview with Thompson and review of his records, Dr. Woods concluded that Thompson suffers from schizophrenia that "is severe and ongoing" and that he "is currently incompetent to be executed." *Id.* at 462.

The third report came from Dr. Sultan, a clinical psychologist, who conducted eleven psychological examinations of Thompson from 1998 until 2004. Pet. App. 7a; J.A. 06-5744, at 485. Dr. Sultan reported that Thompson has suffered from schizophrenia since at least early adulthood and that he "has experienced the delusions, hallucinations, disorganized thinking, and disorganized speech and behavior" characteristic of schizophrenia. J.A. 06-5744, at 485. Dr. Sultan observed that, without his medication, Thompson is "floridly psychotic . . . . unaware of his surroundings" and "the reason for his incarceration, the sentence he has received, or the fact of impend-

ing execution." *Id.* at 486. Dr. Sultan concluded that, in an unmedicated state, Thompson is not competent to be executed because he "clearly d[oes] not understand that the State [i]s seeking to execute him or that his death would be the consequence of such an execution." *Id.* Even with medication, Dr. Sultan reported that Thompson suffered from the delusions described by Drs. Rabun and Woods, and on this basis Dr. Sultan concluded that Thompson "lacks the capacity to understand the fact of his scheduled execution or the reason for it." *Id.* at 487.

c. In addition to his medical records and the three psychiatric reports, Thompson provided the trial court with evidence that, in 2001, the State sought to appoint a conservator to make medical decisions for Thompson, effectively conceding his incompetence. In its papers, the State argued that Thompson suffers from "a long history of Bipolar Disorder and psychotic symptoms," that his "illness is chronic and fluctuating in nature" and that he is "incapable of rational thought" and "has minimal insight into the presence of his illness." J.A. 06-5744, at 721. The State asked that a conservator be appointed to oversee Thompson's medical and psychiatric treatment, including the use of forced medication. *Id.* at 722. The conservator was appointed, and conservatorship continued until October 2003, when it was terminated because Thompson began voluntarily taking his medication.

4. In response to the petition, the State did not dispute the facts just described, nor did it present any evidence to counter Thompson's evidence of incompetency. Instead, the State contended that the

evidence, even if taken as true, did not establish that Thompson was unaware of the fact of his execution or the reason for it. J.A. 06-5744, at 524.

5. Three days after Thompson filed his petition and eighteen exhibits, the trial court denied the petition without holding a hearing. Pet. App. 8a; J.A. 06-5744, at 560-63. In a three-page order, the trial court ruled that Thompson is "aware of the fact of his impending execution and the reason for it," and that he was not entitled to a hearing to develop his incompetency claim. J.A. 06-5744, at 561-62.

6. The Tennessee Supreme Court affirmed, concluding that "[w]hile Thompson's petition and supporting exhibits establish that he is mentally ill, these filings do not raise a genuine issue regarding [his] competency" sufficient to warrant a hearing. *Thompson v. State*, 134 S.W.3d 168, 183 (Tenn. 2004). In the court's view, competency only required Thompson to be "aware of the *fact* of his . . . impending execution and the *reason* for it." *Id.* at 184. In finding Thompson competent, the court rejected evidence of his delusions and history of mental illness as "irrelevant" to his claim. *Id.* at 177.

Justice Birch dissented in part, concluding that Thompson was entitled to a hearing on his competency claim. *Thompson*, 134 S.W.3d at 185. In his view, Thompson's "voluminous evidence of mental illness dating back at least eighteen years" and reports from "three highly qualified experts" explaining that Thompson "suffer[s] from severe, ongoing schizophrenia, and currently 'lacks the mental capacity to *understand* the fact of the impending execution and the reason for it'" satisfied the threshold

showing sufficient to warrant a hearing. *Id.* at 185-86 (emphasis added). Justice Birch observed that the majority had elevated the "threshold showing" into a requirement of "conclusive proof." *Id.*

7. On June 14, 2004, Thompson filed a federal habeas petition asserting that he was not competent to be executed. The case was stayed pending resolution of other proceedings, which culminated in *Bell v. Thompson*, 545 U.S. 794, 813-14 (2005).[1]

When the district court returned to the petition in 2005, Thompson's mental health had further deteriorated. The district court lifted the stay of execution to allow the State to set a new execution date, which would also allow Thompson to present his changed mental-health circumstances to the Tennessee Supreme Court. Pet. App. 10a. The state court again denied his claim, and Thompson returned to the federal district court. On May 4, 2006, the district court dismissed Thompson's habeas petition but issued a certificate of appealability. *Id.* at 11a-12a. Petitioner filed a timely appeal.

8. The court of appeals reversed. It concluded that the Tennessee Supreme Court unreasonably applied *Ford* when it rejected evidence of Thompson's severe delusions and documented history of mental illness as "irrelevant" to his competency

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[1] The State's prior appeal to this Court concerned the propriety of the court of appeals' *sua sponte* decision to withhold its mandate without alerting the parties and its decision to issue an amended opinion after this Court declined to review the initial panel opinion and after the State commenced further proceedings in state court. It has no bearing on the issues involved at this stage.

claim. Pet. App. 19a. It further concluded that "[r]egardless of whether Thompson's incompetency petition should be granted, his evidence has at least created a genuine issue about his competency, and therefore warrants an evidentiary hearing." *Id.* at 20a. The court of appeals accordingly remanded the case to the district court to hold a hearing on Thompson's competency to be executed.

B. Thompson's Rule 60(b) Motion

1. In his original federal habeas petition, Thompson asserted that his counsel had been ineffective in failing to present evidence of his mental health at trial and sentencing. Pet. App. 12a. Thompson had raised this and three other ineffective-assistance claims in post-conviction proceedings in the state trial court, and had sought appellate review of them in the Tennessee Court of Criminal Appeals. But he had not sought discretionary review of these claims in the Tennessee Supreme Court, instead filing a federal habeas petition.

2. In February 2000, the district court dismissed Thompson's habeas petition, rejecting the four ineffective-assistance claims as procedurally barred because Thompson had failed to seek discretionary review of them in the Tennessee Supreme Court. Thompson requested a certificate of appealability on the procedurally barred claims, but it was denied. *See* Docket 00-5516, 5/24/00 Application for a COA.

3. In June 2001, after the district court dismissed Thompson's habeas petition but while his other claims were pending in the court of appeals, the Tennessee Supreme Court promulgated Rule 39, which provides, in relevant part, that:

> [A] litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim.

The Tennessee Supreme Court promulgated Rule 39 in response to this Court's decision in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). In *O'Sullivan*, this Court held that exhaustion of state remedies under AEDPA "require[s] state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State." *Id.* at 847. The Court recognized that some states might have rules providing that a particular remedy is not available and concluded that "nothing in the exhaustion doctrine require[s] federal courts to ignore a state law or rule providing that a given procedure is not available." *Id.* at 847-48. Rule 39 is precisely that sort of rule.

When it enacted Rule 39, the Tennessee Supreme Court expressly stated that it was not changing the law, but merely *clarifying* that it had never required an application for discretionary relief from the state supreme court for habeas-exhaustion purposes:

> We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. *In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby* [adopt] *Rule 39.*

See In re: Order Establishing Rule 39, Rules of the Supreme Court of Tennessee: Exhaustion of Remedies (Tenn. June 28, 2001) (*quoted in Adams v. Holland*, 330 F.3d 398, 405 (6th Cir. 2003)) (emphasis added). The advisory committee notes to the Tennessee Rules of Appellate Procedure also confirm that Rule 39 "works no change" in the rules governing appeal to the Tennessee Supreme Court. *See Adams*, 330 F.3d at 405. Accordingly, the adoption of Rule 39 confirmed that the district court's decision dismissing Thompson's claims as procedurally barred was erroneous even at the time it was issued.

4. Thompson promptly notified the court of appeals of the issuance of Rule 39 and the district court's error in dismissing his ineffective-assistance claims as procedurally defaulted. *See* Docket 00-5516, 8/1/01 Docket Entry. Thompson did not (and could not) immediately seek Rule 60(b)(6) relief in the district court, because controlling circuit court authority at that time would have deemed such a motion to be a successive habeas petition. *See McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir.

1996). The court of appeals initially affirmed dismissal of Thompson's habeas petition in January 2003. It later amended its ruling, and this Court reversed. *Thompson*, 545 U.S. at 796.

5. Six weeks after the case was remanded to the district court, Thompson filed a motion under Federal Rule of Civil Procedure 60(b), explaining that Rule 39 presented an extraordinary circumstance warranting reopening of his habeas petition. Pet. App. 13a. While the district court acknowledged that Rule 39 "shows the error of th[e] Court's previous procedural default ruling," *id.* at 165a, it denied the motion to reopen, concluding that Rule 39 was not "an extraordinary circumstance" and that Thompson's motion had not been filed within a "reasonable time," *id.* at 166a. The district court declined to issue a certificate of appealability on the claim. *Id.* at 172a.

6. Thompson sought a certificate of appealability in the court of appeals on the Rule 39 issue, asking the court of appeals to certify whether he had presented extraordinary circumstances warranting Rule 60(b) relief and whether the Rule 60(b) motion had been filed in a reasonable time. Pet. App. 183a-84a. The court of appeals issued a certificate of appealability on the following question: "whether the Tennessee Supreme Court's enactment of Tenn. S. Ct. R. 39 is an extraordinary circumstance sufficient to warrant re-opening Thompson's original § 2254 petition." *Id.* at 65a.

7. The court of appeals consolidated Thompson's Rule 60(b) appeal with his appeal on his competency-to-be-executed claim. Pet. App. 13a-14a. The court

of appeals held that promulgation of Tennessee Supreme Court Rule 39 was an extraordinary circumstance, because it confirmed that the district court's prior decision dismissing the ineffective-assistance claims as procedurally barred was always incorrect as a matter of law. The court also noted that Thompson had promptly brought the matter to its attention, and held that the reasons for any delay in filing a Rule 60(b) motion were "understandable" given the unique circumstances of the case and did not "detract from the extraordinary circumstance reflected in the promulgation of [Rule] 39." *Id.* at 35a-36a. Accordingly, the court of appeals remanded with instructions for the district court to consider the ineffective-assistance claims for the first time.

REASONS FOR DENYING THE PETITION

I. THIS COURT SHOULD NOT REVIEW THE COURT OF APPEALS' DECISION ON THOMPSON'S *FORD* CLAIM

A. The Decision Below Is Interlocutory, Fact-Bound, Does Not Implicate Any Conflict In The Lower Courts, And Has No Significance Beyond This Case

The narrow decision of the court of appeals remanding the case for a hearing on Thompson's competency to be executed does not warrant this Court's review. The claim arises in an interlocutory posture and may be mooted on remand. The decision does not conflict with any decision of this Court or any lower court, and, in any event, it is both fact-bound and of limited (if any) significance beyond the facts of this case.

1. The competency claim is not presently ripe for this Court's review. After concluding that the Tennessee Supreme Court had unreasonably applied *Ford v. Wainwright*, 477 U.S. 399 (1986), the court of appeals remanded the case to the district court to "decide the merits of [Thompson's] incompetency claim *de novo*." Pet. App. 21a. The *Ford* claim thus arises in an interlocutory posture, which "alone furnishe[s] sufficient ground" to deny the petition for certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari). And where a "Court of Appeals remand[s] the case, it is not yet ripe for review by this Court." *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam).

This case illustrates the reasons for that prudential rule. In remanding the case, the court of appeals directed the district court to "*first* rule on the merits of Thompson's remaining ineffective assistance claims" and "*only* address the incompetency question if [the district court] rejects the ineffective assistance claims." Pet. App. 37a-38a (emphases added).[2] Ac-

[2] This sequence makes good sense for two reasons. First, the district court's erroneous interpretation of state exhaustion law categorically prevented Thompson from presenting his ineffective-assistance claims in *any* federal forum for over ten years. While nothing can cure that delay, expeditious consideration by the district court at least will not further extend it. Second, it conserves judicial resources. If the district court rules in Thompson's favor on one or more of the ineffective-assistance

cordingly, if the district court grants one or more of Thompson's claims of ineffective assistance of counsel, the State's *Ford* argument could become moot. And even if the district court rejects Thompson's ineffective-assistance claims and holds a competency hearing, the State's argument could still prove moot if the district court concludes that Thompson is competent to be executed. On the other hand, if the district court concludes that Thompson is not competent to be executed, the State may then pursue avenues of appropriate appellate relief, including ultimately a petition for certiorari to this Court. Review at this time is thus premature and unwarranted.

2. The court of appeals' decision is also of limited applicability and, accordingly, does not raise an important question warranting this Court's review. The State contends that the court of appeals misread *Ford* in remanding the case for a hearing on the competency claim. Even if that were true (and it is not, as explained below), it is irrelevant beyond this case because this Court's decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007), which further explains the tenets of *Ford*, guides all state-court decisions since *Panetti* was issued in 2007. Since a capital prisoner cannot even raise the claim that he is incompetent to be executed until the state sets an execution date, virtually *all* of the relevant state-court decisions involved in other capital cases will postdate *Panetti* and thus be adjudicated under that standard.

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claims and concludes that he is entitled to further proceedings in state court, that decision could obviate the need for a competency hearing.

3. Additionally, review is unwarranted because the court of appeals' decision is not in conflict with any decision of this Court or any court of appeals. Indeed, the State does not identify any conflict in the lower courts over the question presented. That alone warrants denying review.

Instead, the State contends that the decision below conflicts with *Williams v. Taylor*, 529 U.S. 362 (2000), because *Williams* defines "clearly established" federal law under AEDPA, and the State argues that *Ford* does not contain any clearly established federal law. But that contention is meritless. Although *Williams* describes AEDPA's requirements, the decision below arises on entirely different facts, involves distinct legal issues, and does not conflict with *Williams*. On the contrary, as the State concedes elsewhere, it is *Ford* (not *Williams*) that sets forth both the substantive Eighth Amendment standard prohibiting execution of the "insane" and the minimum procedures a state must provide to give effect to the substantive prohibition. *Ford*, 477 U.S. at 409-10; *see also id.* at 424, 426 (Powell, J., concurring). And this Court has already held that *Ford* constitutes "clearly established federal law" under AEDPA. *See, e.g.*, *Panetti*, 551 U.S. at 949. The State's attempt to manufacture a conflict with *Williams* thus fails.

B. The Decision Below Is Correct On The Merits

1. The State's principal position is not that any of the traditional factors warranting this Court's review are satisfied here, but that the court of appeals simply erred in remanding the case for a hearing on

Thompson's *Ford* claim. That is not a sufficient basis for certiorari review. But even if it were, the decision below is correct on the merits. The court of appeals correctly determined that the Tennessee Supreme Court unreasonably applied clearly established federal law, specifically *Ford*, when it rejected Thompson's competency claim without a hearing and refused to consider evidence of his delusions and history of mental illness.

In *Ford*, this Court held that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 409-10. Once a prisoner "makes a substantial threshold showing of insanity," he is entitled to a "fair hearing" on his competency claim. *Id.* at 424, 426 (Powell, J., concurring). As this Court recognized in *Panetti*, *Ford* is the clearly established law under which competency-to-be-executed claims arising under AEDPA must be evaluated. *See Panetti*, 551 U.S. at 948.

2. *Panetti* also explains that it is error under *Ford* for a state to reject a petitioner's delusions and history of mental illness as categorically "irrelevant" to the competency claim and to fail to hold a hearing when the prisoner carries his threshold burden.

With regard to the delusions and history of mental illness, *Panetti* explains that "[i]t is . . . error to derive from *Ford*, and the substantive standard for incompetency its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted." 551 U.S. at 960. Applica-

tion of such a categorical standard would allow for execution even where the State's interest in, for example, retribution, is not served because the "prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole." *Id.* at 958-59. *Ford* thus prohibits states from using a standard that "automatically forecloses" inquiry into incompetency once the court has found that the prisoner "can identify the stated reason for his execution." *Id.* at 959.

Panetti also explains that under *Ford*, once the prisoner makes a threshold showing of incompetency, he is entitled to certain procedures, including a hearing. 551 U.S. at 948. The failure to provide those procedures is a violation of the clearly established federal law in *Ford*. *See id.* at 948.

3. Based on the foregoing, the Tennessee Supreme Court unreasonably applied *Ford* when it denied Thompson's competency claim without a hearing.

a. The standard the Tennessee Supreme Court used in Thompson's case was an unreasonable application of *Ford*. The state court said that Thompson "need only understand *or be aware of* the fact of his impending execution and the reason for it" to be deemed competent, and that evidence of delusions and a history of mental illness were "irrelevant" once those two prongs were established. *Thompson*, 134 S.W.3d at 183 (emphasis added). But by excluding evidence of Thompson's delusions and history of mental illness, the Tennessee Supreme Court made

the same categorical mistake as the lower court in *Panetti*. In particular, excluding that evidence wrongly equates fleeting factual awareness of the execution and the reason for it with rational understanding. But "[a] prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." *Panetti*, 551 U.S. at 959.

Indeed, the decision below differs from the Tennessee Supreme Court's own decision in *Van Tran*, where it held that "under Tennessee law a prisoner is not competent to be executed if the prisoner lacks the mental capacity to *understand* the fact of the impending execution and the reason for it." 6 S.W.3d at 266 (emphasis added). By replacing the word "understand" with the phrase "understand or be aware of," the Tennessee Supreme Court unreasonably applied not only *Ford* but *Van Tran* itself.[3]

b. The error of the Tennessee Supreme Court is compounded by the fact that the court denied the claim without a hearing. Thompson provided the state court with copious documentation of his long history of mental illness, including prison medical records, three psychiatric reports, and records showing that the State had previously found him incompetent and sought a conservator. Two of the expert affidavits Thompson submitted specifically concluded that he does not understand the fact of the execution and the reason for it. Pet. App. 6a-8a. Accordingly, as the court of appeals recognized, "[t]he evidence Thompson submitted was undoubtedly a

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[3] Thus, even if *Van Tran* is an appropriate application of *Ford*, the Tennessee Supreme Court failed to apply it correctly here.

'substantial threshold showing,' and therefore an evidentiary hearing should have been held." *Id.* at 20a.

The need for a hearing here is all the more clear when this case is compared to *Panetti*. This Court explained there that its "independent review of the record," which consisted of "a letter and a declaration from two individuals, a psychologist and a law professor, who had interviewed petitioner [once] on death row," and "references to the extensive evidence of mental dysfunction considered in earlier legal proceedings," "verified" that petitioner "had made a 'substantial threshold showing of insanity.'" *Panetti*, 551 U.S. at 938, 950. If the record in *Panetti* was sufficient to satisfy the substantial threshold showing, the record here easily clears the same hurdle. By denying Thompson's request for a hearing after he satisfied the threshold showing, the state court applied *Ford*'s procedural mandate in an unreasonable manner.

c. The State argues that the Tennessee Supreme Court's determination was not unreasonable because Thompson's delusions "do not 'prevent[] him from *comprehending* the reasons for the penalty or its *implications*' or undermine his fundamental appreciation of the connection between crime and punishment." Pet. 28-29 (quoting *Ford*, 477 U.S. at 417) (emphases added). But that assertion only repeats the error of the Tennessee Supreme Court. "There is, in short, much in the record to support the conclusion that petitioner suffers from severe delusions." *Panetti*, 551 U.S. at 956. Among other things, those delusions lead Thompson to believe

that he will be exonerated through a military tribunal. He also believes that the State's means of executing him (electrocution) will not work, either because he can withstand electrocution, or because he will go to Hawaii or "Gangster's Paradise." These are not mere "unorthodox beliefs" about what Thompson thinks will happen after he dies. *Thompson*, 134 S.W.3d at 183. To the contrary, they are manifestations of Thompson's "psychotic disorder" and prevent him from understanding that the State intends to execute him because he was convicted of murder. *Panetti*, 551 U.S. at 960. The overwhelming evidence in the record demonstrates that Thompson's gross delusions "put an awareness of a link between a crime and a punishment in a context so far removed from reality that the punishment can serve no proper purpose." *Panetti*, 551 U.S. at 960. The court of appeals' decision to remand for a hearing is thus correct on the merits.

4. a. The State contends that *Ford* did not set forth any substantive standard for competency and thus "logic dictates that the Tennessee Supreme Court could not have unreasonably applied it in [Thompson's] case." Pet. 27. As already described, that does not call into question the court of appeals' determination that the Tennessee Supreme Court unreasonably applied Justice's Powell's controlling procedural opinion in *Ford* by concluding that Thompson did not even make a substantial threshold showing. Even if it did, the State errs in contending that until this Court sets forth a precise substantive standard for determining competency to be executed, there is no "clearly established law" by which to review the competency determination by the Tennes-

see Supreme Court.

To begin, *Panetti* already refutes this assertion. There this Court explained that *Ford* "constitutes 'clearly established law' for purposes of § 2254." 551 U.S. at 949. Justice Powell's concurrence "sets the minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim," *id.* at 949, and the majority provides that the Eighth Amendment "'places a substantive restriction on the State's power to take the life of an insane prisoner,'" *id.* at 957 (quoting *Ford*, 477 U.S. at 405).

Nor was it necessary to await *Panetti* in order to decide that, under *Ford*, "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Ford*, 477 U.S. at 409-10. This substantive constitutional restriction provides a clear mandate to the States to ensure they do not execute those rendered incompetent by reason of mental illness, regardless of how the State chooses to define the precise competency standard. It is well established that "[r]ules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." *Williams*, 529 U.S. at 382. The State's selection of a competency standard is thus clearly bounded by the Eighth Amendment as clearly established under *Ford*.

b. The State objects (Pet. 27) to the court of appeals' reference to *Panetti*, arguing that *Panetti* does "not qualify as 'clearly established Federal law' with respect to" this case because it post-dated the Tennessee Supreme Court's ruling on Thompson's com-

petency hearing. This is a red herring. The court of appeals did not say that *Panetti* constitutes the clearly established law governing the case; on the contrary, it relied on *Ford*. Pet. App. 15a. Nevertheless, as described above, *Panetti* (another AEDPA case) is *relevant* because it describes *Ford* in a way that conclusively establishes the Tennessee Supreme Court's unreasonable application of *Ford* itself.

Accordingly, the Court should deny review on the *Ford* claim.

II. THE COURT OF APPEALS' RULE 60(B) DECISION PRESENTS NO ISSUE WARRANTING THIS COURT'S REVIEW

A. The Rule 60(b) Decision Does Not Implicate Any Conflict In The Lower Courts, Is Fact-Bound, And Has No Significance Beyond This Case

There is also no reason for this Court to review the court of appeals' conclusion that promulgation of Tennessee Supreme Court Rule 39 constitutes, as applied here, an "extraordinary circumstance" justifying relief under Federal Rule of Civil Procedure 60(b)(6). That decision does not conflict with any decision of this Court or implicate any conflict in the court of appeals. It also both turns on a narrow state-law issue with limited applicability to other cases and involves a fact-specific determination about Thompson's diligence in pressing his claim, and does not warrant review.

1. The question whether Tennessee Supreme Court Rule 39 forms the basis for Rule 60(b)(6) relief

from an erroneously dismissed habeas claim has, perhaps literally, *no* applicability outside the facts of this case. Research by the undersigned suggests that Thompson may very well be the *only* habeas petitioner currently maintaining a Rule 60(b)(6) motion based on the issuance of Rule 39 in federal court in Tennessee. In one other case, the court granted the motion to reopen under Rule 60(b)(6) and the movant's claims have since been resolved. *See Abdur'Rahman v. Bell*, No. 96-0380, *available at* 2008 WL 2002572 (M.D. Tenn. May 7, 2008). And Thompson is likely to be the last. Rule 39 was promulgated over nine years ago, and it is thus difficult to imagine a Rule 60(b)(6) motion filed on the basis of Rule 39 and satisfying the diligence requirement at this point. Review is unwarranted to address a legal issue with no application beyond this case.

2. Nor is there any reason to review the fact-bound determination of the court of appeals that the particular facts of this case satisfy Rule 60(b)'s "extraordinary circumstances" test. Like the decision concerning Rule 39 itself, the question whether Thompson satisfied the Rule 60(b)(6) requirement of "extraordinary circumstances" is a fact-bound inquiry that presents no compelling legal question. Pet. App. 33a. As the court of appeals explained, such decisions are made on a "case-by-case inquiry that requires the trial court to intensively balance numerous factors." *Id.* This Court need not concern itself with such a fact-bound claim. *See* Sup. Ct. R. 10.

3. The court of appeals' ruling also does not con-

flict with any decision of this Court or any other lower court. Indeed, the State does not even attempt to assert that the court's decision remanding Thompson's ineffective-assistance claims conflicts with the decision of any other lower court.

To be sure, the State contends that the court of appeals' decision conflicts with this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), but it plainly does not. As described further below, *Gonzalez* addressed different circumstances and does not remotely control the resolution of this case. The State simply objects to the manner in which the court of appeals applied *Gonzalez* to the facts of this case, which is no reason for the court's review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law."). And, unlike *Gonzalez*, which involved a federal-law basis for reopening a judgment, the decision below does not have national ramifications or indeed any ramifications beyond this case.

B. The Rule 60(b) Decision Is Correct On The Merits

Even if error-correction were a valid basis for seeking this Court's review, certiorari would be inappropriate here because the court of appeals reached the correct result.

1. Thompson was wrongly deprived of the opportunity to pursue four ineffective-assistance claims when the district court found those claims procedurally barred after Thompson did not seek discretionary review in the Tennessee Supreme Court. The Tennessee Supreme Court's promulgation of

Rule 39 made the district court's error apparent and, as the court of appeals recognized, constituted an "extraordinary circumstance" warranting reopening of Thompson's capital habeas petition under Rule 60(b)(6) to reinstate his never-considered ineffective-assistance claims. Absent that remand, Thompson would be categorically (and erroneously) barred from ever presenting those claims in a federal forum.

2. Additionally, relief is appropriate because Thompson was diligent in pursuing his claims. The State erroneously contends (Pet. 34) that Thompson "waited" four years before seeking relief on the basis of Rule 39. The Tennessee Supreme Court promulgated Rule 39 on June 28, 2001, while Thompson's habeas case was pending in the court of appeals. Final briefs had already been filed in the case, so Thompson notified the court of appeals by filing a notice of supplemental authority on August 1, 2001, just one month after Rule 39 was adopted. In issuing its opinion on January 9, 2003, the court of appeals did not address Thompson's notice.

At that point, Thompson could not have sought Rule 60(b)(6) relief in the district court, because circuit court precedent categorically treated Rule 60(b) motions as second or successive habeas petitions. *See McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996), *overruled by Abdur'Rahman v. Bell*, 392 F.3d 174 (6th Cir. 2004) (en banc). The en banc court in *Abdur'Rahman* reversed *McQueen* in December 2004, holding that Rule 60(b) motions were not second or successive petitions. By that point, Thompson and the State were litigating related claims on appeal. Once that appeal was complete and jurisdic-

tion was returned to the district court in January 2006, Thompson promptly filed the present Rule 60(b) motion. Thompson thus pressed the Rule 39 issue diligently throughout the proceedings.

3. Contrary to the State's argument (Pet. 31-37), *Gonzalez* is not in tension with the court of appeals' conclusion that Thompson established extraordinary circumstances. In *Gonzalez*, the district court dismissed petitioner's habeas petition as time-barred under AEDPA, but, after the judgment became final, the Supreme Court interpreted a related provision of AEDPA in a way that would have rendered the petition timely. The petitioner sought relief under Rule 60(b)(6), but this Court concluded that he had not demonstrated "extraordinary circumstances" warranting relief because: (1) the district court's ruling was *correct* when it was issued; and (2) petitioner had not been diligent in pressing his claim. *Gonzalez*, 545 U.S. at 536-37. In the Court's view, these two factors militated against a finding of "extraordinary circumstance[s] justifying relief from the judgment in petitioner's case." *Id.*

a. *Gonzalez* is grounded in the notion that the law is constantly evolving, and it would disserve finality and efficient court administration to allow a litigant to set aside a ruling that was *correct* at the time it was issued simply because there is a subsequent change in the law. 545 U.S. at 536. Accordingly, because "[t]he District Court's interpretation was by all appearances correct under the Eleventh Circuit's then-prevailing interpretation" of the statute, it was "hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court ar-

rived at a different interpretation." *Id.*

In contrast with *Gonzalez*, the present case does not involve a *change* in the law, but rather a *clarification* by the Tennessee Supreme Court about the state of the law as it had been since 1967. The clarification made it unmistakably clear that the district court's decision dismissing Thompson's ineffective-assistance claims for failure to seek discretionary review was a legally erroneous interpretation of Tennessee state law *at the time the decision was issued*.[4] It is indeed the rare and extraordinary case where a state's highest court confirms that a federal district court misinterpreted state law in dismissing capital habeas claims as procedurally barred.

b. The State also overlooks the fact that *Gonzalez* concerned a change in the federal courts' interpretation of a federal statute, and thus did not implicate the important considerations of comity and federalism that are in abundance when looking at the intricate interplay of state and federal schemes of post-conviction relief. Here, in contrast, Thompson has been barred from raising these claims for ten years because of an incorrect *federal* court decision misinterpreting a provision of *state* exhaustion law. Declining to correct this error, and declining to give supremacy to the state's view of its own law, upsets the precise balance between state and federal courts on which AEDPA's exhaustion requirements are based.

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[4] Thus, the State's argument (Pet. 33-34) that if a "*change* in the law will rarely constitute extraordinary circumstances . . . then logic dictates that a bid to reopen habeas proceedings on the basis of something *less than* a change in the law cannot possibly succeed," has it exactly backwards.

Specifically, AEDPA requires a state prisoner wishing to seek federal habeas review to exhaust available remedies in state court. 28 U.S.C. § 2254(b)(1)(A). This "rule of comity" has been a fundamental part of federal habeas review since it was first announced in *Ex Parte Royall*, 117 U.S. 241, 252 (1886), in part because it "giv[es] the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (internal quotation marks omitted).

If comity and federalism are served by a requirement that state prisoners exhaust their habeas claims in state court before proceeding to federal court, then those interests are actively disserved when a federal court declines to give effect to the state's laws defining exhaustion. *See Stringer v. Black*, 503 U.S. 222, 235 (1992) ("It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law."). In this way, Rule 39 constitutes an extraordinary circumstance justifying relief under Rule 60(b)(6) in Thompson's case.

4. The State's additional assertion that its interest in finality has been impinged does not transform this question into one warranting review. Indeed, finality considerations weigh in favor of Thompson, not the State, in these narrow circumstances. As this Court has noted, the death penalty is "unique in both its severity and its finality." *Monge v. California*, 524 U.S. 721, 732 (1998) (internal quotation marks omitted). Thompson should be permitted to assert claims that he received ineffective assistance

during the proceedings that led to his death sentence and, thus, that he was deprived of the "fundamental right of criminal defendants[, which] assures the fairness, and thus the legitimacy, of our adversary process." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986).

In these unique—indeed, extraordinary—circumstances, the court of appeals' decision to remand this case for consideration of the ineffective-assistance claims was correct and does not warrant review.

III. THE COURT OF APPEALS DID NOT EXCEED THE SCOPE OF THE CERTIFICATE OF APPEALABILITY

The court of appeals concluded that Thompson was entitled under Rule 60(b) to have the district court consider his ineffective-assistance claims in part because Thompson presented those claims in a timely fashion. The State now contends that that question was beyond the scope of the court of appeals' jurisdiction. This fact-bound argument does not warrant review and is without merit.

1. This question amounts to nothing more than a fact-bound claim about the wording of the COA and, accordingly, it does not warrant this Court's review. The State does not argue that the COA was issued under the wrong legal standard or otherwise presents an issue of national importance, as was the case in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). Even if the State were correct that the court of appeals exceeded the scope of the COA, the State is seeking nothing more than error-correction, which is no reason to grant review.

That conclusion is particularly obvious here because this is a problem of the State's own making. If the State were concerned about the scope of the COA, it could have brought that to the attention of the court of appeals. The court, in turn, could have amended or expanded the COA or otherwise clarified that the timeliness question was properly before it. *See, e.g.*, *United States v. Shipp*, 589 F.3d 1084, 1087 (10th Cir. 2009); *Villot v. Varner*, 373 F.3d 327, 337 n.13 (3d Cir. 2004). Instead, the State failed even to alert the panel to this asserted issue in its briefing.

2. In any event, the timeliness question is within the scope of the COA. The court of appeals granted the COA on the question "whether the Tennessee Supreme Court's enactment of Tenn. S. Ct. R. 39 is an extraordinary circumstance *sufficient to warrant re-opening Thompson's original § 2254 petition*." Pet. App. 65a (emphasis added). As this Court recognized in *Gonzalez*, the question whether a habeas petitioner has been diligent in pursuing relief is subsumed within the question whether he has demonstrated an extraordinary circumstance warranting relief under Rule 60(b)(6). *See* 545 U.S. at 537-39 ("[Petitioner's] lack of diligence confirms" that there is no "extraordinary circumstance justifying relief from the judgment in petitioner's case."). The court of appeals likewise recognized the nested nature of the timeliness question, noting: "Although the Federal Rules do not mandate the specific time by which the motion must be filed, a movant's lack of diligence can detract from the extraordinariness of the circumstance." Pet. App. 35a.

Indeed, the State's contrary view would have

rendered the COA the court of appeals *did* issue an academic endeavor. If the State were correct that the court of appeals had no jurisdiction to consider whether Thompson acted diligently, it necessarily follows that the court of appeals would have had no jurisdiction to award relief, because even if adoption of Rule 39 were extraordinary, the court had no authority to determine whether Thompson acted diligently and was thus entitled to relief. The State's view thus renders the entire appeal an exercise in the issuance of an advisory opinion. There is no warrant for reading the COA to deprive jurisdiction from the very court that issued it.

3. Finally, even if there were any doubt whether the diligence question was fairly included within the COA, it is not unreasonable "to read [a] COA as including" both the certified question and a "closely related" issue. *Cornwell v. Bradshaw*, 559 F.3d 398, 412 (6th Cir. 2009). A helpful analogy is to this Court's consideration of issues within a question presented, in which "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." Sup. Ct. R. 14.1(a). The question of Thompson's diligence in pressing his claims is plainly a "subsidiary question" within the "extraordinary circumstances" inquiry. *See Gonzalez*, 545 U.S. at 537-39.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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